IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 10-0142

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KATHY HEFFERNAN, ROBIN CAREY, DAVID HARMON and NORTH DUNCAN DRIVE NEIGHBORHOOD ASSOCIATION, INC.,

Plaintiffs/Petitioners and Appellees,

v.

MISSOULA CITY COUNCIL, CITY OF MISSOULA; and JOHN ENGEN, Mayor,

Defendants/Respondents and Appellants,

and

MUTH-HILLBERRY, LLC

Intervenor-Defendant and Appellant.

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# BRIEF OF APPELLANT MISSOULA CITY COUNCIL, CITY OF MISSOULA; AND JOHN ENGEN MAYOR

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On Appeal from the Montana Fourth Judicial District Court
Missoula County Cause No. DV 08-84
The Honorable Robert L. Deschamps III, Presiding

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## STATEMENT OF THE CASE

Intervenor-Defendant and Appellant Muth-Hillberry, LLC (Muth-Hillberry) submitted a detailed public record proposal for Rattlesnake Valley Sonata Park Subdivision (Sonata Park) to Defendants/Respondents and Appellants City of Missoula (City). After legal public notice, public comment occurred at public hearings December 4, 2007 at Planning Board and December 10, 2007 at City Council; public city council plat annexation and zoning (PAZ) committee meetings, December 5, 2007 and December 12, 2007; as well as a City Council public meeting December 17, 2007 for proposed Sonata Park. At the December 17 meeting the City Council, by a 10-2 vote, conditionally approved a further revised

Sonata Park proposal with 34 conditions of approval for 37 residential lots on 34.08 acres at a density of approximately 1.1 residences per acre. See Letter of Approval (December 18, 2007), Exhibit #1.

Plaintiffs/Petitioners and Appellees Heffernan et al. appealed the City Council's conditional subdivision approval. Appellees amended the complaint once. The District Court's Order of May 21, 2008, denied the City's Motion to Dismiss for lack of standing, pursuant to the standing limitations set forth in § 76-3-625 MCA. Exhibit #2. The District Court denied the City's first Motion for Summary Judgment on January 14, 2009. Exhibit #3. On February 24, 2010 the District Court granted summary judgment to Appellees and denied summary judgment to the City. Exhibit #4. The City appeals the February 24, 2010 Opinion and Order as well as the other orders identified above.

## STATEMENT OF THE FACTS

Sonata Park is in the City within the Missoula community's urban growth area and the municipal wastewater facility sanitary service plan area. City sanitary sewer service and Mountain Water is available. See City's Findings of Facts and Conclusions of Law (October 19, 2009) (FoF/CoL) p. 7, ¶ 47 and p. 4, ¶ 23, Exhibit #5. When the City annexed the land in 1989, County zoning had been two dwelling units per acre. FoF/CoL p. 2, ¶ 9, Exhibit #5. Pursuant to § 76-2-306 MCA, after annexation, the City initially interim zoned the land two dwelling units

per acre for the statutorily allowed two and one half years. FoF/CoL p. 2, ¶ 9. Then the land became and remained unzoned because zoning protests pursuant to § 76-2-305 MCA forced a requirement for extraordinary majority votes of approval to adopt zoning, which the City Council was not able to attain. FoF/CoL p. 2, ¶ 10.

The applicable Growth Policy 2005 Update as a guide to Sonata Park lands subdivision review (FoF/CoL p. 4, ¶ 22) states with respect to sanitary sewer service as well as urban development:

> 1. Sewer collection systems were recently extended to East Missoula and the Mullan Road area. Plans are being developed to extend sewer collection systems in the Rattlesnake[,] . . . Page 2-34 (in part, emphasis added).
>
> 2. Planning and Development of infrastructure are among the most important tools for well managed growth. Decisions about infrastructure may affect, deter, or promote integration of development and environmental values. #9 at Page 3-2.
>
> 3. Protect riparian corridors to provide wildlife habitat and movement areas and to buffer water bodies. Page 3-3.
>
> 4. Provide for logical expansion of communities while maintaining environmental quality and keeping the expenditure for public services and facilities at a reasonable level. Page 3-3.
>
> 5. Development Patterns and Land Use Objectives – General at page 3-4:
>
> a. Accommodating growth, retain historical resources, and provide appropriate open spaces in the design of development so that areas of greater density remain healthy, safe, and livable.
>
> b. Encourage and support new land development within or immediately adjacent to areas where public services are currently available both to maximize local government efficiency and to promote a logical growth pattern.
>
> c. Encourage low density development in areas distant from sewer or other public facilities and services, in part to maintain rural character and environmental quality.

6. Development Patterns and Land Use Objectives – Residential, at page 3-4:

a. Encourage development at appropriate densities within the urban growth area.

b. Encourage a residential land use pattern that provides a high quality living environment in a variety of residential settings, protects public health and safety, minimizes local government service costs, and preserves natural resources.

c. Encourage the design of low density development within or adjacent to the urban growth area in such a way as to accommodate potential re-subdivision and infill.

7. Local Services and Facilities Goals and Objectives; General local Services and Facilities Goals-#2 at page 3-6.

a. Encourage development to locate in areas where facilities are available and where the public costs of providing needed facilities and public services are lowest.

b. Local Services and Facilities Goal and Objectives; General local Services and Facilities Objectives-#3 at page 3-6: Develop infrastructure to accommodate present development and plan infrastructure to meet the needs of anticipated growth in accordance with public values and goals.

The 1998 Missoula Urban Area Comprehensive Plan sets forth guidelines for interpreting land use (growth policy) maps:

> Outside of the urban growth area, land has been allocated for residential use at varying densities. Urban residential development with a maximum density of six (6) dwelling units per acre has been designated for areas outside of the urban growth area that have a community sewer system. Areas adjacent to the growth area with no community sewer are recommended for suburban residential development at a maximum density of two units per acre, such as Target Range or Linda Vista.
>
> . . . .
>
> Where sewer and other services are available and there are no environmental constraints, greater density may be appropriate.
>
> . . . .
>
> Again, these densities are general, intended to represent a range and the general sort of development pattern which can be anticipated.

> Actual site characteristics should also be considered when evaluating a proposed development.

1998 Missoula Urban Area Comprehensive Plan, p. 81. Also FoF/CoL p. 5, ¶ 29, Exhibit #5.

Sonata Park design utilizing clustering of residences was limited in density by the City imposed PUD. FoF/CoL p. 4, ¶ 13-21. Much less than half of Sonata Park land will actually be subdivided into platted lots. FoF/CoL pp. 24–26, Pedestrian Access and Parks and Recreation, with respect to the required open space, sidewalks, landscaped boulevards, 20' wide trail easements, and 100' wide buffer along Missoula's Open space. The resulting open space lands far exceed the subdivision law requirements for park dedication in § 76-3-621 MCA. FoF/CoL p. 25, ¶ 2.

The City Council deleted four lots from the proposed subdivision in the area of a minor riparian resource (FoF/CoL at pp. 12–13, ¶¶ 83–89) in which the riparian area is explained as a "woody draw" containing non-willow shrub type trees or bushes, and allowed three of the deleted lots to be relocated in conjunction with other residential clusters. A total of 37 residential lots were conditionally approved to be located within various residential clusters. See Letter of Approval, p. 5, condition #21, Exhibit #1.

Duncan Meadows residential subdivision is proposed immediately north and adjacent to Sonata Park. FoF/CoL p. 1, ¶ 2, Exhibit #5. It is anticipated that a

temporary cul-de-sac located within Sonata Park for which a variance was obtained, will continue into Duncan Meadows so that a loop road will exist with respect to the two adjacent subdivisions rather than cul-de-sacs. FoF/CoL p. 9, ¶¶ 55-56, Exhibit #5.

During the subdivision review process for Sonata Park, the Missoula Fire Department (MFD) publically commented they had no concerns with the development. FoF/CoL p. 9, ¶¶ 56, 57, 59, 60, Exhibit #5. Specifically with respect to Appellees' grass fire concerns, MFD does not believe grass fires pose a significant hazard. FoF/CoL p. 10, ¶¶ 63-64, Exhibit #5. A subdivision approval condition requires a fire hydrant plan reviewed and approved by MFD including installation of fire hydrants prior to combustible construction. Letter of Approval, p. 2, condition #10, Exhibit #1. Also FoF/CoL p. 8, ¶ 51, Exhibit #5.

Office of Planning and Grants' (OPG) staff report pursuant to rezoning review criteria findings of fact in Art. V, ¶¶ 51 and 52 noted the Montana Fish, Wildlife and Parks commented:

> [w]hile there is considerable use of the site by white-tailed deer, we would not expect any significant impacts on that population, given the fact that the deer are already an urbanized feature of the Rattlesnake Valley.
>
> . . .
>
> the site lays at the southeastern-most edge of elk winter range, and Montana Fish Wildlife and Parks does not expect the subdivision to cause problems for elk, because most of the elk use is to the north and west, and upslope of the proposed development.

FoF/CoL p. 13, ¶ 90.

In addition, subdivision approval conditions include:

> Plans for road construction across the Yellowstone Pipeline shall comply with Yellowstone Pipeline Company (YPL) Encroachment Guidelines and shall be reviewed and approved by YPL prior to final plat approval. If required by YPL a signed and executed Encroachment Agreement shall be returned to the utility, and appropriate development provisions shall be included on the final plat and in the subdivision covenants, prior to final plat approval. Subdivision Regulations 3-1(2).
>
> The subdivider shall prepare a geotechnical study for the site, and any site alterations shall conform to the recommendations contained in the geotechnical study, subject to review and approval by Public Works and OPG prior to final plat approval. Submittal of "as built" record drawings shall be accompanied by an engineer's certification that all work was completed in compliance with the geotechnical report. Any changes in soil conditions noted by the engineer shall be outlined in the certification with the engineered remedy employed to address the change. Subdivision Regulations 3-1(2).

Letter of Approval, p. 2, conditions #15-#16, Exhibit #1.

During the 1990's the city council created the general zoning classification Rattlesnake Valley Planned District Overlay Zone (Rattlesnake Overlay) set forth in § 19.98.010 through § 19.98.090 Missoula Municipal Code, this overlay zoning district must be specifically adopted as an overlay in order to actually apply to any specific land. The City Council has never adopted and applied the Rattlesnake Overlay to lands in Sonata Park. FoF/CoL p. 7, ¶¶ 38-39, Exhibit #5. Appellees' litigation erroneously attempted to rely on non-existent zoning with respect to Sonata Park lands causing misleading litigation confusion. See Amended

Complaint, pp. 14–6, ¶¶ 36-41. Any attempt to consider applying the Rattlesnake Overlay to Sonata Park land would be protestable by a Muth-Hillberry property owner pursuant to § 76-2-305 MCA.

Historically, pursuant to an October 21, 1986 interlocal agreement between the City and Missoula County, the local governments agreed to extend city sanitary sewer to portions of the Rattlesnake Valley pursuant to a large diameter sewer main designed to provide sewer service for the entire Rattlesnake Valley. FoF/CoL p. 6, ¶ 35, Exhibit #5. This agreement was included in Ch. 12 of Muth-Hillberry's Sonata Park application as is the January 26, 2007 Montana Fish Wildlife and Parks agency comment letter the District Court erroneously states at p. 6:16–20, n. 1 was not in the public record.

Pursuant to a March 20, 1989 contractual agreement between the City, County, and Sunlight Development Company, a substantial number of acres of Sunlight Development lands, including the Sonata Park land, was monetarily assessed as property benefiting pursuant to Missoula County Rural Special Improvement District 416 created to provide a city large diameter sanitary sewer main designed to provide sanitary sewer service for the entire Rattlesnake Valley. A copy of this agreement was included in Muth-Hillberry's application.

## STANDARD OF REVIEW

An appellate court reviews a district court's grant of summary judgment de novo, applying the same criteria applied by the district court pursuant to Rule 56(c) M.R.Civ.P. The review should be whether, based on the public record subdivision review process, the City acted arbitrarily or capriciously in conditionally approving Sonata Park. See Madison River R.V. Ltd. v. Town of Ennis, 2000 MT 15, P30, 298 Mont. 91, P30, 994 P.2d 1098 (citing North Fork Pres. v. Dept. of State Lands (1989), 238 Mont. 451, 458-59, 778 P.2d 862, 867). The District Court shouldn't substitute its decision for the City.

Pursuant to § 76-3-625 MCA, the standard of review for a governing body's decision to approve, conditionally approve, or disapprove a preliminary plat is whether the record establishes the governing body acted arbitrarily or capriciously. A reversal of the governing body is not permitted merely because the record contains inconsistent evidence or evidence that might support a different result. In order for the City Council decision to be reversible, the decision must appear to be random, unreasonable, or seemingly unmotivated, based on the record. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836, see also Madison River RV v. Town of Ennis, 2000 MT 15; 298 Mont. 91; 994 P.2d 1098; 2000 Mont. LEXIS 13.

## SUMMARY OF THE ARGUMENT

Appellees have not adequately pled or established standing to sue pursuant to § 76-3-625 MCA. The District Court erroneously denied the City's Motion to Dismiss due to Appellees' failure to comply with the standing limitations set forth in Montana Subdivision and Platting Act provision § 76-3-625 MCA. Also, the District Court erroneously, in violation of § 76-1-605 MCA, applied land use plans, such as the growth policy and Rattlesnake Valley Plan, as regulatory rather than guides for consideration. Section 76-1-605 MCA explicitly states "a growth policy is not a regulatory document." (Emphasis added.) Further, the District Court erroneously applied a "substantial compliance" review standard which is no longer the standard of review after the 2003 Montana State Legislature's adoption of SB 326 generally revising laws related to growth policies including "clarifying that the extent to which the required elements of a growth policy are addressed is at the full discretion of the governing body" as well as revising the provisions governing the use of an adopted growth policy through amendments to § 76-1-605 MCA adopting subsection (2) stating a growth policy is not a regulatory document and does not confer any authority to regulate as well as stating that a governing body may not deny any land use approval based solely on compliance with a growth policy. (Emphasis added.) See Laws of Montana, Vol. III, Ch. 599 (SB 326) pp. 2540–2549, Fifty Eighth Legislature (2003), Exhibit #6. Finally the District Court

erroneously struck City affidavits explaining that contrary to Appellees' assertions, Sonata Park land had never been zoned Rattlesnake Overlay. The overlay zone was not relevant to this litigation. Affidavits of City Clerk Marty Rehbein and Mary McCrea of OPG explained this, but the Court erroneously struck these affidavits.

## ARGUMENT

### I. Did the District Court Err by Denying the City's Motion to Dismiss Pursuant to § 76-3-625 MCA of the Montana Subdivision and Platting Act Establishing Limitations as to Who has Standing to Sue a Local Government for Conditionally Approving a Subdivision?

The Montana Subdivision and Platting Act is set forth in Title 76, Ch. 3, MCA. Section 76-3-625 MCA pertains to subdivision lawsuits against local governments. Section 76-3-625 expressly limits who has standing to sue pursuant to the Montana Subdivision and Platting Act setting forth the required criteria for "a party identified in subsection (3) who is aggrieved" to have standing to sue. Subsections 76-3-625(2), (3), (4) MCA provide:

> 76-3-625. Violations -- actions against governing body.
>
> . . .
>
> (2) A party identified in subsection (3) who is aggrieved by a decision of the governing body to approve, conditionally approve, or deny an application and preliminary plat for a proposed subdivision or a final subdivision plat may, within 30 days from the date of the written decision, appeal to the district court in the county in which the property involved is located. The petition must specify the grounds upon which the appeal is made.
>
> (3) The following parties may appeal under the provisions of subsection (2):
>
> (a) the subdivider;

(b) a landowner with a property boundary contiguous to the proposed subdivision or a private landowner with property within the county or municipality where the subdivision is proposed if that landowner can show a likelihood of material injury to the landowner's property or its value;

(c) the county commissioners of the county where the subdivision is proposed; and

(d) (i) a first-class municipality, as described in 7-1-4111, if a subdivision is proposed within 3 miles of its limits;

(ii) a second-class municipality, as described in 7-1-4111, if a subdivision is proposed within 2 miles of its limits; and

(iii) a third-class municipality or a town, as described in 7-1-4111, if a subdivision is proposed within 1 mile of its limits.

(4) For the purposes of this section, "aggrieved" means a person who can demonstrate a specific personal and legal interest, as distinguished from a general interest, who has been or is likely to be specially and injuriously affected by the decision. (Emphasis added).

Section 76-3-625 MCA criteria required for each party attempting to sue a local government with respect to a conditional subdivision review are:

1. A "landowner" subsection 76-3-625(3)(b) MCA;
2. The "landowner" is required to be able to "show a likelihood of material injury to the landowner's property or its value" subsection 76-3-625(3)(b) MCA;
3. The party must be "aggrieved" subsection 76-3-625(4) MCA; and
4. "Aggrieved" means a person who can demonstrate a specific personal and legal interest as distinguished from a general interest and "who has been or is likely to be specifically and injuriously affected by the decision." Subsection 76-3-625(4) MCA.

No Appellee meets the standing criteria pursuant to the Amended Complaint. The ambiguous general references to increased motor vehicle traffic, noise, pollution, and loss of aesthetic value (Amend. Compl. p. 2, ¶¶ 1-3) inadequately meet the criteria standards set forth in § 76-3-625 MCA.

North Duncan Drive Neighborhood Association is not pled as a landowner. The Association is therefore NOT eligible to have standing to sue pursuant to § 76-3-625 MCA. Pursuant to Montana's rules of statutory construction, § 1-2-101 MCA, "a judge is not to insert what has been omitted or omit what has been inserted." (Emphasis added.) Also, none of the Appellees have met the statutory standing criteria requiring evidence of "material injury" to landowner property or its value, while also demonstrating a specific personal and legal interest "specially and injuriously affected causing each of them personally to be an aggrieved party."

The District Court erred in allowing each Appellee to have standing to sue when no Appellee adequately plead eligibility for standing as an aggrieved landowner incurring "material injury" specially and injuriously adversely affecting their respective property or its value through personal specific injury as required by Subsections 76-3-625(2), (3), (4) MCA establishing statutory limitations for suing a local government.

Pursuant to the Montana Subdivision and Platting Act, in order to be eligible to sue, Appellees Heffernan, Carey and Harmon must establish that as a "landowner" they can "show a likelihood of material injury to" their "landowner's property or its value" (see § 76-3-625(3)(b) MCA) from "a specific personal and legal interest, as distinguished from a general interest who has been or is likely to be specially and injuriously affecting their property or its value" (see § 76-3-625(4)

MCA) pursuant to the conditional approval of Sonata Park § 76-3-625(2), (3) MCA.

Pursuant to § 76-3-625(2) MCA only "aggrieved" parties have standing to appeal a governing body's conditional subdivision approval to district court. Subsection 76-3-625(4) MCA defines "aggrieved" as "a person who can demonstrate a specific personal and legal interest, as distinguished from a general interest, who has been or is likely to be specially and injuriously affected by the decision." (Emphasis added.)

Appellees plead allegations of injury, that the traffic, noise, pollution, and loss of aesthetic value have adversely affected their use and enjoyment. See Amend. Compl., p. 2, ¶¶ 1 – 3. Those allegations are ambiguous and too general at best and do not meet the standard set out in § 76-3-625 MCA requiring proof of "aggrieved" as "a person who can demonstrate a specific personal and legal interest, as distinguished from a general interest, who has been or is likely to be specially and injuriously affected by the decision."

In support of the City's legal arguments, see and compare Swan Lakers v. Lake County Bd. of Comm'rs, 2007 Mont. Dist. LEXIS 750 in which the court held general allegations of injury do not constitute adequate specific injury to property:

> Plaintiffs contend that these impacts meet the constitutionally-based requirement for a personal stake in the litigation that differs

> from injury to the general public and show that his property is materially injured. The claimed impacts of the proposed subdivision on Mr. Wirth's views, solitude, and "quiet enjoyment" of his property- as well as any increase in traffic and resulting safety issues-may demonstrate impacts specific to Mr. Wirth as distinguished from general grievances, [5] may constitute an "injury in fact," [6] and may be sufficient to meet constitutional requirements for standing, [7] but they do not constitute injuries, environmental or otherwise, to Mr. Wirth's property.
>
> Rather, Plaintiffs contend that material injury to the financial value of the property is just one injury to value that a property owner could allege. Plaintiffs contend that for Mr. Wirth the most important and material value of his property is its setting and solitude. Plaintiffs point to Mr. Wirth's affidavit as clearly alleging the likelihood of material injury to the value of the property for providing solitude, serenity, peace and opportunity for contemplation.
>
> "Value" is not defined in the Montana Subdivision and Platting Act. The Court must construe the statute as written, according to the plain language of the statute if the legislative intent [*25] can be determined from the plain meaning of the words used. *Druffel v. Board of Adjustment*, 2007 MT 220, P16, 339 Mont. 57, 168 P.3d 640. The Montana Supreme Court has already set forth the plain meaning of "value" in the context of property, stating: 'When applied to property, and no qualification is expressed or implied, "value" means the price which the property could command in the market.' (*In re McGhee's Estate*, 105 Iowa 9, 74 N.W. 695; *Fox v. Phelps*, 17 Wend. (N.Y.) 393; Missouri, *K. & T. Ry. Co. v. Crews*, 54 Tex. Civ. App. 548, 120 S.W. 1110.)

Swan Lakers v. Lake County Bd. of Comm'rs, 2007 Mont. Dist. LEXIS 750, at ¶¶ 31 – 34. (Emphasis added.)

Appellees must establish they are aggrieved, as well as establish likelihood of material injury to their property or its value, as well as plead how they each had a specific personal or legal interest "specially and injuriously" affected. There must be material injury to each property or the property's value. Appellees' allegations

of being "adversely affected" or sustaining a purported "loss of aesthetic value" do not comply with the criteria as required by § 76-3-625(2), (3), (4) MCA. They are vague, ambiguous general assertions that do not establish the required "specific personal and legal interest." Pursuant to § 1-2-101 MCA, the role of the district court judge is "not to insert what has been omitted or to omit what has been inserted" in order to assist Appellees to bring their lawsuit. (Emphasis added.) This lawsuit should have been dismissed for failure to state a claim pursuant to Rule 12 M.R.Civ.P. because no Appellee has adequately pled or established valid standing to sue.

## II. Did the District Court Err When it Granted Appellees' Motion to Strike?

Appellees created litigation confusion by making assertions pertaining to a zoning district classification, the Rattlesnake Overlay that had never actually been adopted and applied to Sonata Park lands. City affidavits were necessary to explain the zoning district had never been applied to Sonata Park lands. The District Court erred in striking the affidavits and in allowing Appellees to continue an erroneous zoning district argument. Pursuant to Rule 56(e) M.R.Civ.P. affidavits are allowed to be submitted and considered as part of a summary judgment motion and brief:

> Rule 56(e). Form of affidavits -- further testimony -- defense required.
> . . .
> The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in

this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.
. . .

Rule 56 M.R.Civ.P., in part. (Emphasis added.)

Appellees alleged in their complaint the Rattlesnake Overlay as well as the Growth Policy was not complied with when the City approved Sonata Park. The City is entitled to prove by affidavit pursuant to Rule 56 M.R.Civ.P., the Rattlesnake Overlay was never implemented by the City Council. Appellees erroneously asserted an issue that was not true and not part of the subdivision review that had to be addressed. It was not in the record before the City Council, because it did not exist, never having been adopted for the Sonata Park lands.

## III. Did the District Court Err When it Denied the City's Motions For Summary Judgment?

A. Did the District Court err when it denied in its January 14, 2009 Opinion and Order, the City's Motion for Summary Judgment?

Pursuant to § 76-1-605 MCA the District Court may not interpret and apply land use Growth Policy as land use regulations requiring certain specific items when the land use plans are intended to only serve as a guide for consideration during the subdivision review. Also the District Court did not understand the significant substantive difference between a City Council vote to conditionally approve a preliminary subdivision plat and subsequent final plat review in the future at which time any City Council vote to approve final plat approval, pursuant

to § 76-3-611 MCA may only occur if the subdivider has complied with each of the preliminary conditions of subdivision approval. Further, the City's conditional subdivision approval based on applicant's submittal coupled with the 34 conditions of approval constituted substantial compliance with the applicable growth policy, even though that high of a review standard was no longer necessary. The District Court applied the wrong standard with respect to subdivision review pursuant to a growth policy, because "substantial compliance" is no longer the required review standard. According to the Montana Supreme Court it appears the Montana State Legislature's 2003 Amendment of § 76-1-605 MCA was intended to lessen the substantial compliance standard of review for subdivision reviews. Note the title to Laws of Montana Volume 111, Chapter No. 599 (SB 326) 2003 states that SB 326 revising Montana's Growth Policy Laws, was "clarifying that the extent to which the required elements of a growth policy are addressed is at the full discretion of the governing body." (Emphasis added). Exhibit #6.

The District Court unlawfully applied land use plans intended as guides for consideration as regulatory when they are not regulatory pursuant to § 76-1-605 MCA, plus applied a subdivision review standard of "substantial compliance" that is no longer the subdivision review standard. Pursuant to § 76-1-605 MCA, it is explicitly stated a growth policy is not a regulatory document. It is only a guide for consideration. The existing public record and applicable land use law does not

provide any meritorious basis for supporting the District Court's Opinion and Order (February 24, 2010) granting Appellees Summary Judgment and denying the City's summary judgment. The City Council did not act unlawfully or arbitrarily and capriciously when conditionally approving the subdivision with 34 conditions. Nor does the record support a District Court determination that the City did not substantially comply with the applicable growth policies, even if that were still the standard, which it is not. Muth-Hillberry's application coupled with the City Council's 34 conditions of approval did "substantially comply" with the applicable growth policy, even though the Montana State Legislature in 2003 lessened the subdivision review standard to less than "substantial compliance."

Judicial deference should be provided legislative body subdivision determinations. See Whistler v. Burlington Northern Railroad Co., 741 P.2d 422 (1987) which held:

> We agree that when interpreting a zoning ordinance, considerable judicial deference should be accorded the interpretation provided by an officer charged with its enforcement.

Whistler at 426. (Emphasis added.) See also Montana Contractors' Ass'n v. Dept. of Highways, et al., 715 P.2d 1056 (1986) which held:

> [g]reat deference and respect must be shown to the interpretation given a statute by the officers or agencies charged with its administration.

Montana Contractors' Ass'n at 1058-1059. (Emphasis added.)

As noted earlier SB 326 in part clarified "that the extent to which the required elements of a growth policy are addressed is at the full discretion of the governing body." (Emphasis added.) City Council subdivision approval was based on this public record process. All facts are in the public record. The air stagnation zone, while identified as existing, is not a genuine issue that had to be addressed in this subdivision review. Fire places are already prohibited in new residential construction. A continuation of this regulation is sufficient. Further, continually improving air pollution devices on motor vehicles over the years have significantly reduced air pollution from motor vehicles. Also, the number of motor vehicles at any residence fluctuates over time, such as for example how many high school/college students who drive are in the family household at any given point in time. This fluctuates as a family's children grow up and become teens and adults.

The District Court denied all Motions for Summary Judgment stating there existed "disputed issues of fact regarding whether, in the process of approving 37 dwelling units, the City was guided by and gave consideration to the Growth Plan or essentially ignored it? This is best left for the finder of fact." Opinion and Order (January 14, 2009), pp. 11-12. The public record is permeated with growth policy consideration from the developer's application through the applicable staff reports to the final conditional subdivision approval letter. The title for SB 326 explicitly indicates, the extent to which the required elements of a growth policy are

addressed is at the full discretion of the governing body. Pursuant to § 76-1-605 MCA, the City was required to be guided by and give consideration to the general policy and pattern of development set out in the growth policy which the City did extensively. The City is not required to address each growth policy element or to attempt to satisfy the impossible by satisfying all conflicting perspectives or evidence before it and is authorized to weigh the evidence while being guided by and giving consideration to the growth policy.

> The Board possessed the discretion to weigh this conflicting evidence and reach a decision. *Christianson v. Gasvoda*, 242 Mont. 212, 214-15, 789 P.2d 1234, 1235-36 (1990). The record may contain conflicting evidence so long as a substantial amount of evidence [**339] supports the Board's decision and the Board explains why they weighed certain evidence.

Englin v. Board of County Commrs., 2002 MT 115, ¶¶ 20, 27, 310 Mont. 1, 48 P.3d 39. (Emphasis added.)

B. Based on applicable growth policy law, § 76-3-605 MCA, did the District Court Err in its Opinion and Order (February 24, 2010) when denying the City's Motion for Summary Judgment?

The City respectfully submits the District Court misunderstands subdivision law as well as misunderstood the standard of review required to be applied by the Court. The District Court erroneously interpreted plans as regulations contrary to § 76-1-605 MCA and did not understand that subdivision preliminary plat approval is not final plat approval. Pursuant to § 76-3-611 MCA final plat approval occurs

later "only" after the developer has complied with the conditions of preliminary plat approval.

The District Court erroneously interpreted land use plans as regulations by using the word "required" with respect to land use policies. For examples see p. 3:9 and p. 28:6, or "dictated" by plan, p. 15:18, coupled with several pages of judicial assertions of failures to address elements the City was not required to address. See pp. 15–25. Also, twice the District Court misunderstands the applicant's Mountain Line Bus proposal and the fact that this step is only preliminary plat approval and the developer will have to adequately address the Mountain Line Bus issue prior to final plat approval. See p. 14:7–18 and p. 19:4–9. The District Court's Mountain Line Bus comments make it readily obvious the court does not understand the difference between preliminary plat approval and final plat approval.

Comprehensive Plans are guidelines – not regulations, nor zoning. Controlling state law explicitly prohibits the governing body from denying a subdivision or imposing conditions based solely on lack of compliance with the comprehensive plan. Comprehensive plans are guidelines not regulations. Pursuant to § 76-1-605 MCA, a Growth Policy IS NOT a regulatory document, but should only serve as a guide for consideration. Subsection 76-1-605(2) MCA states a governing body may not deny a subdivision based solely on compliance with a growth policy. The 34 conditions of approval for the Sonata Park application

demonstrate substantial compliance with the Growth Policy, even though the former substantial compliance standard was lessened by the 2003 Montana State Legislature's amendments to § 76-1-605 MCA which provides:

> **76-1-605. Use of adopted growth policy.** (1) Subject to subsection (2), after adoption of a growth policy, the governing body within the area covered by the growth policy pursuant to 76-1-601 must be guided by and give consideration to the general policy and pattern of development set out in the growth policy in the:
>
> (a) authorization, construction, alteration, or abandonment of public ways, public places, public structures, or public utilities;
>
> (b) authorization, acceptance, or construction of water mains, sewers, connections, facilities, or utilities; and
>
> (c) adoption of zoning ordinances or resolutions.
>
> (2) (a) a growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations adopted pursuant to the law.
>
> (b) A governing body may not withhold, deny, or impose conditions on any land use approval or other authority to act based solely on compliance with a growth policy adopted pursuant to this chapter.

(Emphasis added.) Subsection (2) was added by the 2003 Montana State Legislature. Cases discussing the additions made by the 2003 Montana State legislature include Citizen Advocates for a Livable Missoula v. City of Missoula, et al., 2006 MT 47; 331 Mont. 269; 130 P.3d 1259; 2006 Mont. LEXIS 59 and Lake County First v. Polson City Council, 2009 MT 322, 352 Mont. 489; 218 P.3d 816; 2009 Mont. LEXIS 470. This Court has stated:

> [f]rom its plain reading, it may be assumed that the 2003 legislation was intended to reduce in some fashion the reliance which local governing bodies are required to place upon growth policies when making land use decisions.

Citizen Advocates for a Livable Missoula, *Id.* (Emphasis added.)

In Lake County First this Court held with respect to the statutory purpose of a growth policy, as a non-regulatory document:

> In consideration of the stated statutory purpose of a growth policy as a non-regulatory document, and the absence of any indication [**495] that the PGP was intended to apply retroactively, we conclude the District Court reached a correct and reasonable determination. To hold otherwise would require the Council to put all applications on hold pending approval of a new growth policy, repeat the review process under the new policy, or attempt to apply a not-yet-finalized growth policy to an application. Under these facts, we cannot conclude there was error.

Lake County First v. Polson, 2009 MT 322, 352 Mont. 489; 218 P.3d 816; 2009 Mont. LEXIS 470. (Emphasis added.)

Even though it appears the standard for consideration of growth policies during the subdivision review process has lessened from "substantial compliance", the City's level of review and analysis for the Sonata Park application and conditions of approval did meet the former substantial compliance standard of review pursuant to conditionally approved Sonata Park with 34 conditions. In its Findings of Facts and Conclusions of Law, there were many references to compliance with the applicable Comprehensive Plan: Zoning Findings #22-40 and Conclusions #1-9 under the review criterion "Whether the zoning is compatible with the Comprehensive Plan" (pp. 4-7); and Subdivision Findings #9-15 and Conclusions #1-9 under Zoning & Comprehensive Plan Compliance (pp. 18-21)).

As the standard of review relates to this particular issue, Heffernan must demonstrate the City acted arbitrarily and capriciously or unlawfully when it approved the Sonata Park application with 34 conditions, for 37 dwelling units on 34 acres of land. The record does not provide support for any determination that the City Council decision was arbitrary or capricious, or that the decision does not substantially comply with the goals and guiding principles of the Rattlesnake Valley Comprehensive Plan (Rattlesnake Plan) as a whole. The District Court's Opinion and Order (February 24, 2010) is what is arbitrary, capricious and unlawful. The District Court did not understand subdivision law by not understanding the role and purpose of growth policies or preliminary plat approval, prior to final plat approval; or the effects of the 2003 amendment to § 76-1-605 MCA; or interpreting land use plans as regulations when § 76-1-605 MCA prohibits applying growth policy provisions as regulations.

Appellees and the District Court primarily focus on one aspect of residential density, ignore the provisions triggered when public utilities are available, and also ignore other goals of the dozens of pages of goals outlined in the Rattlesnake Plan as well as ignore the legislative intent and effect of adopting SB 326 (2003) revising growth policy law. This type of singular analysis is contrary to the Montana Subdivision and Platting Act review process required by § 76-3-608 MCA establishing subdivision review criteria.

A review of the entirety of the record shows the City gave thorough consideration to and were guided by the growth policy. The Rattlesnake Plan states in part:

> When making decisions based on the Plan, not all of the goals, policies and proposals for action can be met to the same degree in every instance. Use of the Plan requires a balancing of its various components on a case-by-case basis. It also requires a selection of those goals, policies and proposals for action most pertinent to the issue at hand. The common theme of all the goals, policies and proposals for action is acceptance of them as suitable approaches toward solving problems and reaching goals. Other valid approaches may exist and may at any time be used. Adoption of the Plan does not necessarily commit jurisdictions to immediately carry out each policy to the letter, but does put them on record as having recognized the desirability of the goals, policies, and proposals for action to the best of their ability, given sufficient time and resources.

Rattlesnake Plan, p. 3, in part. (Emphasis added.)

The plan also states:

> [f]uture development in the Rattlesnake is not simply a number game. The number of additional dwelling units to allow is only part of the equation in looking to guide future development. Future development should occur where it is most appropriate generally, and in a manner which is appropriate for the particular site conditions. Appropriate in this context means two things: (1) the natural environment is protected, and (2) the public health, safety and welfare are protected. Rattlesnake Plan, Goals and Guiding Principles, pgs. 17-18 (citing 1992 Limited-Scope Update, Rattlesnake Valley Comprehensive Plan Amendment) (emphasis added). Further, the intent of the 1995 RCVP update was as a guide for a maximum of ten years, "...this Plan provides an update of goals, land use recommendations, and other recommended actions to guide land use decisions in the Rattlesnake for the next 5 to 10 years."

Rattlesnake Plan, Preface, p. 1.

The District Court in Brookshire v. Board of County Comm'rs, 2006 Mont. Dist. LEXIS 41, 5 at ¶ 11 determined:

> Also of crucial importance is the introduction statement to the comprehensive plan which provides: it is important to emphasize that the Comprehensive Plan is not an end, but a means. It is a reference documents of facts, relationships and attitudes to help in the decision –making process. The plan is not a dictation of what must be or an answer book for complicated questions. It is merely a manual and source of information to help the County derive its own answers. *Brookshire*, Id., at 5, paragraph 11, emphasis added.

Appellees' assertion that density suggestions in the Growth Policy are requirements that absolutely limit the number of dwelling units on the Sonata Park lands to 7 or 8 dwelling units is a misrepresentation of the policy itself, as well as the guiding principles of growth policies in general. Also, their dwelling unit calculations are less than OPG's interpretation of 10-11 dwelling units for this reference point. The section Appellees quote from is the Goals and Guiding Principles section of the inapplicable Rattlesnake Overlay.

This sort of singular argument is directly contrary to the underlying principles of subdivision review and the use of growth policies, which are intended as a tool to guide development and are not regulatory documents. § 76-1-605(2) MCA. In essence, Appellees' arguments attempt to require a standard of strict compliance with the growth policy. Appellees attempt to require strict compliance with the provisions of the growth policy is misplaced, as the strict compliance standard has specifically been found to be unworkable and one which defeats the

whole idea of planning. North 93 Neighbors, Inc. v. Board of County Commissioners of Flathead County, 2006 MT 132, ¶ 22, 332 Mont. 327, ¶ 22, 137 P.3d 557, ¶ 22 (citing Little v. Board of County Com'rs, Etc., 193 Mont. 334, 353, 631 P.2d 1282, 1293 (1981)). North 93 Neighbors was decided based on an analysis of pre 2003 law. As a result of the 2003 amendment to § 76-1-605 MCA North 93 Neighbors and Little are no longer the applicable law pursuant to SB 326, the 2003 amendments to growth policy laws.

A growth policy's impact on specific subdivision projects is statutorily driven. Other states' requirements with respect to compliance with a master plan or comprehensive growth plan, vary according to their statutory provisions. There are at least two states, Colorado and Washington, that have similar statutory provisions to Montana. These State Courts have interpreted or limited a growth policy's use to that of being a guide or a resource not requiring strict compliance with the growth policy when considering subdivision projects. In Colorado, the Colorado Court of Appeals stated:

> [a] master plan is a guide to development rather than an instrument to control land use. The master plan is merely an advisory document that embodies policy determinations and guides principles, whereas the implementation tool, the zoning ordinance, provides the detailed means of giving effect to those principles. The master plan is not the equivalent of zoning, and is therefore not binding upon the discretion of the legislative body.

Teobald. Board of County Comm'rs, 644 P.2d 942, at 1339 (Colo. Ct. App. 1981). (Emphasis added.)

Also, the Washington Appeals Court held:

> [T]he Growth Management Act establishes a general framework under which certain local governments are required to plan for land uses in accordance with statutory guidelines, it does not have site-specific effect at the project level. 'The GMA does not have site-specific effect at the project level. Instead, it establishes a general framework in which local governments are required to plan in accordance with certain guidelines.'

Timberlake Christian Fellowship v. King County, 114 Wn. App. 174, 61 P.3d 332, 2002 Wash. App. LEXIS 2387.

Specifically, the District Court erred by accepting Appellees assertions as well as by not recognizing 2003 SB-326 revisions to Montana's growth policy laws, such as amendment of § 76-1-605 MCA changed the standard of review. The District Court also erred by not recognizing a purpose of SB 326 was to clarify that the extent of which the required elements of a growth policy are addressed is at the full discretion of the governing body.

The District Court placed illegal and inappropriate regulatory legal emphasis on land use policies. Section 76-1-605 MCA entitled *Use of Growth Policy* provides "a growth policy is not a regulatory document and does not confer authority to regulate." (Emphasis added.) When considering a subdivision, the City is to give consideration to the growth policy as a guide. The Montana Supreme

Court has previously observed with respect to the 2003 legislative amendment that since the amendments to § 76-1-605 MCA, substantial compliance with the growth policy is likely no longer the standard. See Citizen Advocates for a Livable Missoula v. City of Missoula, et al. 2006 MT 47.

The applicant, OPG Staff in their recommendations as well as the City Council pursuant to the 34 conditions of approval were guided by and gave consideration to the general policy and pattern of development set out in the growth policy and other applicable land use plans as part of the extensive public review leading up to the conditional approval of Sonata Park. The District Court's Opinion and Order (February 24, 2010) arbitrarily and capriciously ignored a core provision of the growth policy that is triggered by the presence of public utility services. The 1998 Missoula Urban Area Comprehensive Plan setting forth guidelines for interpreting the land use maps associated with a growth policy, land use master plan and comprehensive plan states:

> Areas adjacent to the growth area with no community sewer are recommended for suburban residential development at a maximum of two units per acre. . . .
>
> Where sewer and other services are available and there are no environmental constraints, greater density may be appropriate.

Missoula Urban Area Comprehensive Plan, p. 81. (Emphasis added.) Pursuant to the explicit language of the applicable growth policy, a greater density may be appropriate because sewer and water are available.

Final subdivision design and density determinations are the authority and jurisdiction of the local governing body to determine. See § 76-3-608(3), (4) MCA (criteria for local government review) as well as § 76-3-621(4) MCA (subdivision park dedication requirements). Also, see SB-326 (2003) revising growth policy laws.

The City Council's conditional subdivision approval for Sonata Park was thorough, valid, legally sound and should be upheld. It was not "arbitrary or capricious." See § 76-3-625(1) MCA. The City adopted many responsive or mitigating measures revising the original Sonata Park proposal in response to public comment after OPG's staff report recommended findings were initially issued. The City adopted revisions after OPG's staff report was issued. The City revisions as part of the public review process included but were not limited to:

> (1) a 100 foot no build open space buffer on Sonata Park Land adjacent to existing city open space lands, (2) a reduction in housing density from applicant originally desired 53 to 37 dwelling units, (3) a reduction in zoning density from nearly two dwelling units per acre to 1.1 per acre, (4) lower building maximum heights for some proposed lots, (5) no proposed platted lots being allowed on some potentially riparian sensitive lands in and near a draw, (6) more unplatted open space land than Applicant proposed (7) maximum 40% lot coverage for some lots, (8) a ten-foot wide landscaping buffer for any lots located along any common boundary line with a common area, (9) a public record geo tech report available for public review and comment prior to City officials final plat review determination of compliance for approval by the City (10) the developer agreed to proposed open space common area and park land exceeded 15 acres for a 34 acre subdivision, approximately 45% of the land area which far exceeded the statutory park land dedications required by § 76-3-621 MCA.

C. The District Court erred numerous times in its factual findings in its Opinion and Order (February 24, 2010 )

The District Court unlawfully imposes a "requirement" that the City specifically address numerous growth policy elements, even though SB 326 (2003) clarified the extent to which the required elements of a growth policy are addressed is at the full discretion of the governing body. The City respectfully notes several examples in which the District Court made unlawful or incorrect findings in its Opinion and Order (February 24, 2010), Exhibit #4.

1) The court incorrectly alleges that two letters of support from different agencies, City Parks & Recreation as well as State Fish, Wildlife & Parks were not in the record. These letters were included with the application materials and therefore included in the "record" before the City Council and the District Court. (Op. Ord. p. 6, n. 2)

2) The December 3, 2007 City Council Minutes did not include discussions on Sonata Park and were not part of the Stipulated Record for Sonata Park review. Jennie Dixon, OPG, referenced a separate presentation given to council on December 3, 2007 in her December 10, 2007 presentation for Sonata Park. The December 3, 2007 presentation described for City Council generally the role growth policies and land use designations play in land use review. The December 3, 2007 minutes were provided to the District Court at its request. (Op. Ord. p. 6, n. 2)

3) The court erred with respect to the applicability and context of the Air Stagnation Zone. The e-mail that was provided to the court was an explanation from an OPG staff person along with reference to the specific definition/map. The Air Stagnation Zone is officially defined by its geographical boundaries. See 2000 Missoula City-County Air Pollution Control Program Regulations. Subdivision regulations refer to the Air Stagnation Zone when specific regulations apply within the zone. The District Court's "definition" included in its Order is a general description of the Air Stagnation Zone and misunderstood by the court. (Op. Ord. p. 10, pt. 1, n. 4)

4. The court erred by determining "the record does not support bike paths, public transportation, etc." and "there is no finding that the subdivider actually petitioned Mountain Line and received approval for the property to enter the Mountain Line Service District." (Op. Ord. p. 11, ¶ 1) Contrary to the court's conclusion, there were findings and conclusions before the City Council regarding the development of bike paths and public transportation. Specifically, FoF/CoL, p. 24 provides, "Bike paths: not required by Subdivision Regulations." And FoF/CoL p. 25, "Missoula Urban Transportation District (MUTD) recommended that the subdivider petition to annex into the MUTD prior to final plat approval." (Emphasis added.) There was no requirement that the subdivider petition to annex

into the MUTD prior to subdivision approval. See also Letter of Approval, condition #9, Exhibit #1.

5) The court erroneously required findings with respect to impacts from traffic: "There are no findings or conclusions regarding the impact on air quality as it related to the addition of exhaust emissions generated by 314 more trips to and from town daily within the Air Stagnation Zone." (Op. Ord. p. 11, ¶ 3, ll. 20–22) The City is not required to have findings specifically on the impact of increased ADT resulting from the subdivision on air quality. The estimated 314 additional trips is a relatively small amount. There is no information on how far these trips are, where they are going, or what type of vehicle is being driven, all of which affect emissions in addition to the fact that emissions on vehicles are improving every year. For context, Duncan Drive had approximately 1870 ADT in 2007, and several arterials in town (Reserve, Brooks, Higgins, Broadway, etc.) which are also in the Air Stagnation Zone had 20,000-40,000 ADT in 2007. (Missoula Transportation Study Area Traffic Counting Program 03-10-10.) In addition, the Air Stagnation Zone covers all of the City and a good portion of the County. The court incorrectly overemphasized the significance of Sonata Park's inclusion in the Air Stagnation Zone. The City also required that covenants incorporate Health Department recommended language regarding air quality impacts of sanding on streets. (FoF/CoL, p. 8, #46)

6) The court appears to misunderstand that although bus service is not currently provided for this land, there is the ability to petition to be included in the Mountain Line Bus service. (Op. Ord. p. 12, ¶ 1, ll. 3–8) Subdividers are required to petition to obtain bus service before the final plat is approved. Infrastructure improvements are installed prior to final plat approval and are not required prior to subdivision approval. The court overemphasizes bus service but fails to recognize other infrastructure and services, such as city sewer, public water, City Fire and Police, Missoula hospitals, and utilities that are available for the land as well.

7) The court omits that there will be a 150' buffer between the adjacent property and the Sonata Park Lands that leads to open space. (Op. Ord. p. 12, ll. 18–7)

8) The court errs by stating "there are few if any 'appropriate park and open space provisions for Sonata Park in the City's Findings and Conclusions.' " (Op. Ord. p. 13, ll. 1–9) Contrary to the court's determination that Sonata Park does not have appropriate park and open space provisions, Sonata Park met parkland dedication requirements in the Subdivision Regulations by setting aside over 16 acres (48%) of the property as open space. (Zoning Findings #89; Subdivision Findings – Parks & Recreation #1-14)

9) The court inaccurately states the subdivider was not required to and did not prepare a Riparian Resource Management Plan and Map. (Op. Ord. p. 13, ll.

10–27, p. 14) The City required a Riparian Resource Management Map as a condition of approval. The riparian vegetation was not discovered until a site visit after the project was submitted, at which time OPG Staff recommended the City require a Riparian Resource Management Plan and Map as conditions of approval of the subdivision.

10) The court incorrectly determined the location of proposed Sonata Park with respect to the plan area. (Op. Ord. p. 15, ¶ 3) The "area" referred to by the plan is the plan area, and proposed Sonata Park is not near or close to the northwest corner of the plan area. The court neglected to note that protection of riparian resources is required as conditions of approval. See Letter of Approval, Conditions #24, #25, #26, Exhibit #1.

11) The court incorrectly determined there was not enough protection of wildlife habitat by referencing the installation of "Wildlife Crossing" signs. (Op. Ord. p. 17, ¶ 1) The court fails to reference the many other conditions and findings related to preserving wildlife habitat. Wildlife habitat and corridors are protected through conditions of approval regarding the riparian area, and through approving the developer's proposal to designate 16 acres of the subject property as open space. Letter of Approval, conditions #21, #22, #23, Exhibit #1. See also FoF/CoL, p. 13, ¶¶ 87–92.

12) The court incorrectly states that according to the plan, the 1.09 du/acre density approved for Sonata is more appropriate for the lower Rattlesnake. (Op. Ord. p. 18, c) The Plan designates a recommended land use of 6-8 du/acre for most of the lower Rattlesnake except Greenough Park. Rattlesnake Plan Map #13.

13) The court erred by determining lower and moderate income housing should be made available. (Op. Ord. p. 22, d) Land values in the Rattlesnake don't support lower- and moderate-income housing. The smaller size of the lots (due to the clustering and preservation of open space) are more affordable than the larger lots on neighboring properties.

14) The court erred by only quoting part of Jackie Corday's explanation of common area. (Op. Ord. p. 22, h) The full quote is: "The applicant's proposed designation of the central draw as common area is acceptable and actually preferable to public park since we already have a substantial amount of City Open Space to the north, west and south." The court fails to note numerous findings on how parkland dedication requirements are satisfied. Sonata Park met parkland dedication requirements by setting aside over 16 acres (48%) of the property as open space. (Zoning Findings #89; Subdivision Findings – Parks & Recreation #1-14).

15) The court erred by determining this development should resolve current needs in the area. (Op. Ord. p. 22, i) Developments are required to "pay their own

way" by installing on-site improvements and, in this case, a sidewalk along Teddy Turn off-site (connecting to Duncan Drive). New development cannot be required to address current needs. For example, Duncan Drive may have many needs but Sonata Park is not required to address needs that already exist and are not related to the land use proposal itself.

16) The court erred by determining the plan for public sewer didn't qualify as "readily extended." (Op. Ord. p. 23, j) While it's possible to argue over what "readily extended" means, the end result is the same; sewer will be extended and will serve the subdivision or the final plat for the subdivision will not be able to be approved.

## CONCLUSION

The District Court's Opinion and Order (February 24, 2010) should be reversed as to summary judgment for Appellees. The City should be granted either dismissal of the lawsuit, summary judgment, or the case should be remanded with appropriate guidance from this Court. Appellees have not adequately pled standing to sue pursuant to § 76-3-625 MCA. The Montana State Legislature's 2003 Amendment of § 76-1-605 MCA was intended to lessen the substantial compliance standard of review for subdivision reviews. The District Court applied the wrong standard of review with respect to subdivision review pursuant to a growth policy. The District Court erroneously gave regulatory effect to land use policies contrary

to § 76-1-605 MCA which explicitly states that a growth policy is not a regulatory document.

The District Court also did not understand SB 326 (2003) clarifying that the extent to which required elements of a growth policy are addressed is at the full discretion of the governing body or the significant substantive difference between city council vote to approve a preliminary subdivision plat the conditions of which must all be met before final plat approval.

Respectfully submitted this 13th day of July, 2010.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of July, 2010, I caused a true and accurate copy of Brief of Appellant City of Missoula to be mailed to:

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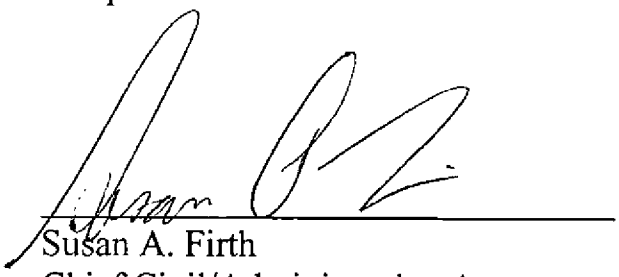
## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word 2007 is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 13th day of July, 2010.



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## APPENDIX